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'I Love You Wills': Considerations for Happily Married Couples

Although I Love You Wills make sense in certain situations, a part of our job as estate planners is to ensure that our clients understand the consequences of these types of outright plans.

By **Amy Neifeld Shkedy and Rebecca Rosenberger Smolen** | December 20, 2021

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Being estate planners, we meet with many individuals, couples and families, each with a different set of family dynamics. In our various meetings, it's always a pleasure when we meet with happily married couples. In fact, one of the questions we have listed in our estate planning questionnaire is "state of marriage." The purpose of this question actually has nothing to do with whether or not a married couple is on solid ground or if the marriage is on the rocks. Rather, the question is meant to find out whether the couple was married in the commonwealth of Pennsylvania, the state of New Jersey or perhaps a community property state like California. But it always makes us smile when, every once in a while, a client fills out the answer to that question by writing something like "happy" or "great marriage."

For many of those happily married couples, particularly those with long-lasting marriages, they initially ask us to prepare wills that would leave their assets outright to the surviving spouse (often referred to as "I Love You Wills"). Although I Love You Wills make sense in certain situations, a part of our job as estate planners is to ensure that our clients understand the consequences of these types of outright plans, and whether an alternate approach may be more appropriate, as it oftentimes is.

The most basic consideration for an outright will is to understand that after the first spouse dies, the surviving

spouse is free to leave all of the assets to the beneficiaries of his or her choice and can change his or her will at any time up until his or her subsequent death. Thus, even if both wills are drafted at the same time by the same attorney, providing for an outright distribution to the spouse and a contingent provision for other beneficiaries if there is no surviving spouse, those contingent provisions become irrelevant in the will of the first spouse to die. The next day, the surviving spouse can change those provisions. This may not be a concern for an older married couple with children of the same marriage where everyone gets along. However, even in those situations, it's still important to recognize that the surviving spouse could always remarry, in which case some or all of those assets could be diverted from the children in the future.

For those couples that cannot be dissuaded from an "I Love You Will," although not ideal, the couple (generally a couple in a second marriage) could agree to sign a contract to require that the surviving spouse leave the assets at death as directed in the contract and to restrict the spouse from making certain gifts of those assets during his or her lifetime. This contract to make a will and restrict gifts approach is certainly not bullet proof and has its flaws, particularly a complete loss in flexibility, so it is usually a last resort for couples that do not want to deal with trusts.

The best way to retain some level of control over the assets at the second death is to consider leaving assets in trust for the benefit of the spouse, rather than outright, so that at the spouse's subsequent death any remaining assets would pass in accordance with the wishes of the decedent's will pursuant to the trust remainder provisions in that will. If a couple is not concerned with maintaining any control over the assets at the second death or preserving the assets for each spouse's intended beneficiaries, there may be other considerations that lean in favor of leaving assets in trust for a spouse, rather than giving assets to a spouse as an outright distribution. For example, funding a trust at the first death would preserve the first spouse's federal estate tax and generation-skipping transfer tax exemptions (currently at $11.7 million in 2021, keeping in mind that, under current law, only the federal estate tax exemption is portable between spouses, but the generation-skipping transfer tax is not portable). Also, there may be other nontax reasons such as increased protection from creditors (including future spouses if remarried) and Medicaid planning. The trust can be set up to be flexible and even allow the surviving spouse to serve as sole trustee, if desirable (of course a co-trustee would provide oversight and a check and balance). The trust can also provide the spouse with a limited power of appointment to allow the survivor to modify the remainder provisions in case circumstances change. This power of appointment given to a spouse will typically be limited to allowing the spouse to modify how the assets will pass to the children (or more remote descendants) or perhaps charity at the survivor's death (i.e., changing the trust terms for the children), and would not give the spouse the right to appoint the assets to anyone.

After considering the pros and cons of a trust structure for the spouse, some clients still choose to leave assets outright to their spouse for the sake of simplicity and continuity after death. For these estate plans where the desire is for an outright distribution without mandating or imposing a mandatory trust structure on the survivor, we typically add an optional disclaimer trust provision (a belt and suspenders approach to an outright will), giving the surviving spouse the choice to use or not use the protection of the trust. In this type of plan, the default provision in the will is that all assets pass outright to the spouse consistent with our client's wishes. However, there is an additional provision in the will that allows the surviving spouse to "disclaim" all or a portion of the assets so that any disclaimed assets would pass to a "disclaimer trust" for the spouse's benefit (the spouse can even be the sole trustee of this trust). The advantage of this approach is that there is no mandatory trust imposed on the surviving spouse, so that a postmortem decision can be made by the surviving spouse. If he or she wants to continue to receive the assets outright, then nothing more needs to be done. On the other hand, if, after consulting with his or her estate planning attorney, there is a good reason (perhaps due to a change in tax laws or another change in circumstances) to have the assets held in trust, then the spouse could disclaim assets within nine months of death and have the assets held in trust for his or her benefit. This allows a couple to defer the "trust" decision until after the first spouse's death in case there are tax reasons or other reasons that a trust is advisable. One disadvantage of a disclaimer trust arrangement, as

opposed to a mandatory trust, is that the first spouse to die loses control over the assets since the decision as to whether to take the funds outright or in trust are solely left up to the survivor. Another difference between a mandatory trust for the spouse versus an outright distribution with disclaimer trust option is that once the disclaimer trust is established, if that is what is decided upon by the spouse, the surviving spouse cannot be granted a power of appointment at death so that there is no flexibility to change the terms at the survivor's death.

After weighing the pros and cons, and considering different scenarios and future outcomes, even the most happily married couples may choose to impose a trust structure on the surviving spouse, understanding that it protects the spouse and the family, whether from taxes or other people. Oftentimes, for the right couple, we structure these trusts to be very flexible and give the spouse a considerable degree of control. Perhaps we should call them, "I Love You Wills— With Trusts." At the end of the day, whether the wills provide for an outright distribution, an outright distribution with a disclaimer trust option or a mandatory trust, there is no better way to say "I love you" than to have a well thought out estate plan and make sure the surviving spouse is adequately provided for.

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